88-1589

Supreme Court, U.S.
FILED
MAR 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP FITANIDES,
PETITIONER,

v.

THE STATE OF NEW HAMPSHIRE,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

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I

QUESTION PRESENTED FOR REVIEW

Whether a search warrant authorizing a search for "fireworks, smokebombs, records, ledgers, U.S. currency, and slot machines" described the records and ledgers to be seized with the particularity required by the Fourth Amendment when the affidavit in support of the warrant application did not establish probable cause to seize every record and ledger on the premises to be searched.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

Prayer

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Hampshire entered on December 28, 1988, affirming the petitioner's convictions in the Merrimack County New Hampshire Superior Court, and denying the petitioner's motion for reconsideration on February 3, 1989.

Opinion Below

The opinion of the Supreme Court of New Hampshire, *State* v. *Fitanides*, __ N.H. __, __ A.2d __ (No. 87-430, December 28, 1988) has not been published yet in the reporters. A slip opinion is in the Appendix at A-1.

Jurisdiction

The opinion of the Supreme Court of New Hampshire affirming the petitioner's convictions was entered on December 28, 1988. The petitioner moved the Court to reconsider its opinion, but the motion for reconsideration was denied on February 3, 1989. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(3). This petition is filed within 60 days of the date of denial of the petitioner's motion for reconsideration.

Constitutional Provisions Involved

United States Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

New Hampshire Revised Statutes Annotated ch. 160, 647:2, and 595-A:2.

Statement of the Case

Philip Fitanides is the owner of a small business in Hooksett, New Hampshire known as the Hooksett Trading Post. On May 28, 1986, New Hampshire State Police Trooper Terrence Kineen applied to the Concord District Court for a search warrant to search the Hooksett Trading Post and Philip Fitanides. The search warrant application followed an undercover investigation which revealed evidence showing probable cause to believe Mr. Fitanides was unlawfully selling fireworks at retail and unlawfully possessing slot machines in violation of New Hampshire Revised Statutes Annotated 160:3 and 647:2. The search warrant commanded a search for "fireworks, smokebombs, records, ledgers, U.S. currency, and slot machines" at the Trading Post, but it did not specify the types of records and ledgers to be seized. (A-35). The search warrant application and affidavit did not establish probable cause to seize every record and ledger on the premises.

The search at the Trading Post was conducted the same day the warrant was issued. Fireworks, slot machines, U.S. currency, and records were seized. Within a day of the search, counsel for Mr. Fitanides filed a motion for immediate sealing of records and other relief in the district court to which the warrant was returnable. (A-10). One of the grounds for the motion was that the warrant was overbroad and general because it did not particularly describe the records and ledgers to be seized as required by the Fourth and Fourteenth Amendments. (A-10, 11). The motion was denied, and Mr. Fitanides was charged by informations filed in the Merrimack County Superior Court with unlawful retail sales of fireworks and unlawful possession of slot machines. Counsel for Mr. Fitanides filed a timely motion to suppress raising his rights under the Fourth and Fourteenth Amendments and alleging that the warrant violated the Constitutional requirements of particularity. (A-13). The motion was denied following a hearing. In its order denying the motion, the superior court said:

> The warrant stated that "there is probable cause for believing that fireworks, smokebombs and slot machines are being unlawfully sold and/or possessed. . . ." The warrant authorized the following property to be seized: "Fireworks, smokebombs, records, ledgers, U.S. currency and slot machines." When dealing with such contraband, it would be unreasonable to require any greater particularization. A fair reading of the entire warrant authorized seizure of fireworks, smokebombs and slot machines which are unlawfully sold or possessed, *and records, ledgers and U.S. currency relative to the unlawful sale or possession of such fireworks, smokebombs or slot machines.* See *Andresen* v. *Maryland*, 97 S.Ct. 2737, 2748-49 (1976); *State* v. *Emery*, 123 N.H. 630, 633 (1983). [Emphasis added] (A-8).

The court ruled on requests for findings of fact and rulings of law. A request for a finding that the search warrant did not particularly describe the types of records and ledgers that could be seized was denied. (A-8, 20).

Evidence obtained during the search of the Hooksett Trading Post was used over Mr. Fitanides' objection at the jury trial on the fireworks charges. The evidence included fireworks, records, and the testimony of witnesses whose identities had been discovered during the police review of the records seized at the Trading Post. Mr. Fitanides was found guilty of all charges. He filed a motion to set aside the verdicts based in part on the search warrant deficiencies, again raising the warrant's lack of particularity as required by the Fourth and Fourteenth Amendments. (A-24). The motion was denied and Mr. Fitanides received a suspended jail sentence, one year probation, and fines and penalty assessments totalling $4,400.

Mr. Fitanides' convictions were affirmed on appeal to the Supreme Court of New Hampshire. At all stages of the prosecution, from the district court to the appellate court, Mr. Fitanides argued that the warrant was deficient on Fourth and

Fourteenth Amendment grounds for all categories of things to be seized. The Supreme Court of New Hampshire said that "the specificity required in a search warrant depends upon the nature of the items to be seized" and that the warrant "could not reasonably have described fireworks, smokebombs, and slot machines in greater detail." (A-3). The Court reasoned that it would have been a practical impossibility for the police to distinguish lawful fireworks from unlawful fireworks, given that the only distinction in New Hampshire is the manner in which fireworks are held for sale. (A-4).

The Court applied different reasoning to the warrant's description of records and ledgers. Mr. Fitanides argued that the trial court impermissibly added the words "relative to the unlawful sale or possession of such fireworks, smokebombs or slot machines" by implication to the phrase "records, ledgers" in order to sustain the search warrant. The Court said that words in a search warrant should not be read in isolation, but must be read in their "proper context." Using this reasoning, the Court said:

> Reading the warrant in a common-sense fashion, we conclude that the description of records and ledgers was implicitly limited to those records and ledgers related to the sale or possession of fireworks, smokebombs and slot machines. [Citing *State* v. *Emery*, 123 N.H. 630, 633, 465 A.2d 922, 924 (1983) and *Andresen* v. *Maryland*, 427 U.S. 463, 479-82 (1975).]
>
> Just as the affidavit established probable cause to seize the entire inventory of fireworks, smokebombs and slot machines, it also established probable cause to search and seize records and ledgers relating to these items. See *United States* v. *Hershenow*, 680 F.2d 847, 851-52 (1st Cir. 1982) (warrant description of defendant's accident patient files sufficiently particular where underlying affidavit established probable cause to seize all files). (A-5, 6).

Mr. Fitanides filed a timely motion for reconsideration, again arguing the Fourth and Fourteenth Amendments, but limiting his exceptions to the Court's decision that the records and ledgers to be seized were properly limited by implication to those records and ledgers relating to fireworks, smokebombs and slot machines. (A-27). The Court denied reconsideration by order of February 3, 1989. (A-7).

Reasons for Granting the Writ

THE RULE FASHIONED BY THE SUPREME COURT OF NEW HAMPSHIRE LIMITING THE RECORDS WHICH CAN BE SEIZED IN A DOCUMENTS SEARCH BY COMMON-SENSE IMPLICATION, WHEN THE SEARCH WARRANT ITSELF DOES NOT EXPLICITLY LIMIT THE RECORDS, ASSUMES THAT POLICE WHO CONDUCT SEARCHES WILL BE GUIDED BY THE SAME LIMITATIONS ADDED TO WARRANTS BY REVIEWING COURTS *After* THE WARRANTS ARE EXECUTED. THE RULE WILL REQUIRE POLICE OFFICERS CONDUCTING SEARCHES TO MAKE ON-THE-SPOT INTERPRETATIONS OF WARRANTS IN ORDER TO DETERMINE WHETHER "COMMON SENSE" LIMITATIONS SHOULD BE READ INTO THEM. THE NEW RULE IS IN CONFLICT WITH DECISIONS OF THIS COURT INTERPRETING THE FOURTH AMENDMENT'S PARTICULARITY REQUIREMENT.

The Supreme Court of New Hampshire has now interpreted the Fourth Amendment in a manner which permits the court reviewing a search warrant after the search to add language to the warrant by implication in order to describe the objects to be seized with particularity. The search warrant in this case recited that there was "probable cause for believing that fireworks, smokebombs, and slot machines are being unlawfully sold and/or possessed" and that the objects could be found "in the possession of Philip Fitanides at premises located at The Hooksett Trading Post, Rte. 3, Hooksett N.H." The warrant went on to command the police to seize the following described property: "fireworks, smokebombs, rec-

ords, ledgers, U.S. Currency, and slot machines." (A-35). The affidavit did not establish that every record and ledger at the Hooksett Trading Post related to fireworks, smokebombs, and slot machines. The affidavit in support of the warrant application did not establish probable cause to seize every record and ledger on the premises. Neither the trial court nor the appellate court said there was probable cause to seize every record and ledger. Both courts recognized that a literal reading of the section of the warrant which commanded the police to seize certain objects would have resulted in no limitation on the types of records and ledgers to be seized. Each court, therefore, implied a limitation into the warrant, but the limitations implied were different. The trial court limited the records and ledgers to those "relative to the unlawful sale or possession of such fireworks, smokebombs or slot machines." The appellate court limited the description to "records and ledgers related to the sale or possession of fireworks, smokebombs and slot machines."

The decision below is in conflict with decisions of this Court interpreting the particularity requirements of the Fourth Amendment. *Marron* v. *United States*, 275 U.S. 192, 195, 48 S.Ct. 74, 75, 72 L.Ed. 231 (1927). *See also Coolidge* v. *New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971); *Stanford* v. *Texas*, 379 U.S. 476, 481, 85 S.Ct. 506, 509, 13 L.Ed.2d 431 (1964). A warrant is an order from a court to an officer to do a certain thing. A search warrant requires an officer to search a certain location for particularly described things, seize those things, and make a return on the warrant to the court. New Hampshire Revised Statutes Annotated 595-A:2. If the warrant, like the warrant in this case, commands the officer to seize "records, ledgers", the officer is required to seize what the warrant plainly commands. The officer who conducts the search should not be expected to read limitations into an unambiguous search warrant by implication and commonsense. The statement in the decision below that a common-

sense reading of the warrant implicitly limited the records and ledgers to be seized is not supported by logic, rules of interpretation, rules of grammar, or decisions of this Court interpreting the Fourth Amendment.

The Supreme Court of New Hampshire misapprehended the case authorities which it cited for its interpretation of the Fourth Amendment's particularity requirements in document searches. The cases are cited in the slip opinion. (A-5, 6). *State* v. *Emery*, 123 N.H. 630, 633 (1983), involved a warrant for rubber straps and "other devices used in S&M Sexual Activity." It did not involve a search for documents. *Andresen* v. *Maryland*, 427 U.S. 463, *supra*, made specific reference to particularly described documents "pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland..." See *Andresen* v. *State*, 24 Md. App. 128, 166-67, 331 A.2d 78, 102-103 (1975) (quoting the warrant). The search warrant in *United States* v. *Storage Spaces Designated Nos. 8 & 49*, 777 F.2d 1363, 1370 (9th Cir. 1985), permitted a search for items which included,

> all other drugs, labels for drugs, orders and checks for drugs, *records and correspondence relating to purchases, sales, packing and distribution of drugs;* and other fruits and instrumentalities of crimes which are evidence of violation of or in violation of, 21 U.S.C. § 331(a) and (k). 777 F.2d 1363, 1368 [emphasis added].

The search warrant in *United States* v. *Hershenow*, 680 F.2d 847, 851-52 (1st Cir. 1982), according to the reported case, authorized a search for,

> appointment books for the period January 1, 1976 to December 31, 1979; all accident patient files together with related manila folders containing accident patient history forms, charge cards, bills and correspondence related to accident patient files, active and inactive, for

> the years 1976-79; and a rubber 'Office Exam' hand stamp; which constitute evidence of violations of Title 18, United States Code, Section 1341. 680 F.2d 847, 850.

In each of these cases cited by the court in upholding the search warrant there was an explicit limitation describing the types of records to be seized. Counsel for the petitioner has not been able to find any reported case which has gone as far as the Supreme Court of New Hampshire in interpreting the particularity requirements of the Fourth Amendment in a document search, and he has not found any reported case which holds that the precept section of a search warrant is impliedly limited by a separate recitation in the warrant that the magistrate has found probable cause to believe that a certain crime has been committed or that certain evidence may be found. Counsel does not believe that this Court's decision in *Andresen* v. *Maryland*, supra, relied upon by the Supreme Court of New Hampshire, goes that far.

This Court has stated a preference for clear rules which are easily understood by police officers conducting searches. The rule made by the Supreme Court of New Hampshire requiring the addition of language to unambiguous search warrants by common-sense implication for the purpose of curing lack of particularity will cause confusion and doubt. There will be differences of opinion when limitations are based on common-sense. Even the courts below did not agree on the limitations to be added to the warrant in this case. The trial court limited the records and ledgers to those "relative to the unlawful sale or possession of such fireworks, smokebombs or slot machines." The appellate court limited the records to those "records and ledgers related to the sale or possession of fireworks, smokebombs and slot machines." If the reviewing courts themselves cannot agree on the limitations to be implied into search warrants by common sense, how can the police officer at the scene be expected to make the determination?

Any of the following limitations could be added to the warrant in this case on the basis of common-sense: (1) records and ledgers evidencing possession or sale of any smokebombs, fireworks, and slot machines, without regard to the lawfulness of sale or possession; (2) records and ledgers evidencing the unlawful possession or sale of smokebombs, fireworks, and slot machines; (3) records and ledgers evidencing sale or possession of smokebombs and fireworks, but not slot machines; or (4) all records and ledgers. Interpretation (1) makes sense to the appellate court. Interpretation (2) makes sense to the trial court. Interpretation (3) makes sense if one thinks the records and ledgers to be seized are limited by the categories of objects preceding the words "records, ledgers," i.e. fireworks and smokebombs. Interpretation (4) makes sense of one thinks the words in the command section of the warrant are unambiguous and should be given their plain meaning.

The case comes down to this: The trial court rewrote a clear and unambiguous search warrant by adding language to it for the purpose of curing a lack of particularity, and the appellate court revised the trial court's rewriting of the warrant. The police officers who executed the warrant, however, did not have the courts' revisions when they conducted the search. There is no reason why the limitations written into the warrant by the reviewing courts could not have been written into the warrant by the magistrate before the search. Nothing could have been easier than to describe the records and ledgers to be seized as "records and ledgers relating to the sale and possession of fireworks, smokebombs and slot machines."

The court below has confused the function of magistrates who issue warrants with the function of officers who execute them. It is appropriate for a magistrate to read a warrant affidavit in a common-sense fashion to determine whether there is probable cause [*United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)], but there should be no room for interpretation by the police officers after the war-

rant has been issued. The Supreme Court of New Hampshire failed to recognize the important difference between the magistrate's judicial function and the police officer's executive function. Principles of judicial discretion and interpretation should not be extended to officers executing search warrants.

The holding in this case will not protect the public, and it will not make the task of law enforcement agencies any easier in the long run. As a result of this case, it is possible that law enforcement agencies seeking search warrants in the state courts of New Hampshire will add the boiler-plate phrase "records, ledgers," now approved by the Supreme Court of New Hampshire, to every search warrant without describing the particular records and ledgers to be seized and then rummage through every record and ledger at the location to be searched knowing that when an objection is made, the reviewing court will by common-sense implication interpret the warrant to mean the search was limited to records and ledgers relating to the probable cause for the issuance of the warrant. That will be the effect of this case if the Court does not issue a writ of certiorari.

Conclusion

For the reasons stated herein, the Court should grant a writ of certiorari to correct the erroneous holding by the Supreme Court of New Hampshire.

Respectfully submitted,

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APPENDIX A

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

MERRIMACK
No. 87-430

THE STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

December 28, 1988

Stephen E. Merrill, attorney general (*Andrew W. Serell*, assistant attorney general, on brief and orally), for the State.

Roussos & Boeckeler, of Manchester [*John C. Boeckeler* on the brief and orally), for the defendant.

BROCK, C.J. The defendant, Philip Fitanides, appeals from his conviction in the Superior Court (*Cann*, J.) for unlawful retail sales of fireworks and unlawful exposure of fireworks for sale at retail under RSA chapter 160 (replaced by RSA chapter 160-A, effective May 3, 1988), on the ground that the description of items to be seized in a search warrant failed to satisfy the particularity requirements of both part I, article 19 of the State Constitution and the fourth amendment of the Federal Constitution. The defendant argues that the Superior Court (*M. Flynn*, J.) erred in denying his motion to suppress certain evidence seized pursuant to the search warrant. For the reasons that follow, we affirm.

On May 28, 1986, the Concord District Court (*Sullivan*, J.) issued a warrant authorizing the search of the Hooksett Trading Post in Hooksett, for "fireworks, smokebombs, records, ledgers, U.S. Currency, and slot machines." The underlying affidavit revealed that on several occasions New Hampshire State Police officers assigned to a special investigation unit had purchased fireworks from the defendant, manager of the Hooksett Trading Post. The officers also witnessed the delivery of a shipment of fireworks and observed many customers purchasing fireworks and playing slot machines at this establishment, which operates as a second-hand merchandise store. These facts and others stated in the affidavit led to the belief that the defendant was illegally selling fireworks at retail, exposing and offering to sell fireworks at retail, and in possession of gambling devices. Based on this affidavit the district court judge found that there was probable cause for believing that "fireworks, smokebombs, and slot machines [were] being unlawfully sold/and or possessed."

After the execution of the warrant, the defendant was charged with unlawful retail sales of fireworks and unlawfully exposing fireworks for sale at retail, in violation of RSA chapter 160. The defendant subsequently moved to suppress evidence seized pursuant to the search, partially on the basis that the warrant lacked sufficient particularity with respect to the items to be seized, in violation of the fourth amendment of the Federal Constitution and part I, article 19 of the State Constitution. The court denied the motion, finding that "[a] fair reading of the entire warrant authorized seizure of fireworks, smokebombs and slot machines which [were]... unlawfully sold or possessed, and records, ledgers and U.S. currency relative to the unlawful sale or possession...[of these items]." After a jury trial, the defendant was found guilty of all charges. He then moved to set aside the verdict, arguing in part that the court erred in denying the motion to suppress and in admitting evidence obtained as a result of the search. The motion was denied, and the defendant appealed to this court.

Because the defendant has raised both State and federal constitutional claims, we will examine the State claim first, and then, if necessary, look to the federal claim to determine whether it provides the defendant with greater protection. *State* v. *Ball*, 124 N.H. 226, 232, 471 A.2d 347, 351 (1983); *cf. State* v. *King*, 131 N.H. __, __, __ A.2d __, __ (decided December 9, 1988).

We first address the defendant's argument that because the warrant's description of "fireworks, smokebombs, . . . and slot machines" fails to limit the search to only those items which were unlawful, it constitutes a "general" warrant in violation of part I, article 19 of the State Constitution. This provision requires, in pertinent part, that all search warrants be "accompanied with a special designation of the persons or objects of search, arrest, or seizure . . ." N.H. CONST. pt. I, art. 19. The law is well established, however, that the specificity required in a search warrant depends upon the nature of the items to be seized. *State* v. *Emery*, 123 N.H. 630, 633, 465 A.2d 922, 924 (1983); *State* v. *Salsman*, 112 N.H. 138, 142, 290 A.2d 618, 621 (1972); *see* R. McNamara, 1 *New Hampshire Practice, Criminal Practice and Procedure* § 60 (1980).

In *State* v. *Emery*, we held that the description of various items described in a search warrant was not unconstitutionally vague or general because we "fail[ed] to see how the State . . . could have better described the various rubber strap items, ropes, and pulleys found in the defendant's bedroom and closet . . . ." *State* v. *Emery*, 123 N.H. at 633, 465 A.2d at 924.

In the instant case, we are presented with a warrant which could not reasonably have described fireworks, smokebombs, and slot machines in greater detail. The defendant argues that the warrant should have limited the search only to those items which were unlawful. For support, he points to the trial court's order interpreting the warrant as implicitly authorizing only the "seizure of fireworks, smokebombs and slot machines

which are *unlawfully* sold or possessed." (Emphasis added.) However, the trial court failed to recognize that neither the defendant, nor the facts in the record, suggest how the officers executing the warrant could have distinguished the unlawful items from those held for lawful sale, their only distinction being the manner of sale. Further, there were no facts which indicated, for example, that the unlawfully possessed fireworks were identifiable or kept separate from the lawfully possessed fireworks. Thus, on this record, a more precise description of the goods to be seized was a practical impossibility. *See U.S.* v. *Cortellesso*, 601 F.2d 28, 32 (1st Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980).

Our inquiry, however, does not end here, because a generic description of items in a warrant is permissible only where probable cause exists to believe that a large collection of similar contraband is present. *See U.S.* v. *Cortellesso*, *supra* at 30 ("where goods are of a common nature and not unique there is no obligation to show that the ones sought . . . necessarily are the ones stolen, but only to show circumstances indicating this to be likely" (quoting *Vitali* v. *U.S.*, 383 F.2d 121, 122 (1st Cir. 1967))). This requirement ensures the likelihood that the items seized were in fact unlawful. *See id.* at 31-32. *Compare id. with U.S.* v. *Klein*, 565 F.2d 183, 188 (1st Cir. 1977) (warrant insufficiently particular where affidavit failed to indicate presence of large collection of illegally reproduced audiotapes on premises). In this case, the affidavit underlying the warrant establishes a reasonable belief that the defendant had dedicated a large portion of his inventory of fireworks to unlawful sale. On several occasions within a period of five days, investigating police officers purchased and observed the purchase of fireworks, witnessed the delivery of a shipment of fireworks, and played and observed customers playing slot machines.

We likewise find no fault with the warrant description of "U.S. Currency," because the record does not indicate how

the currency could have been described with greater specificity, and because probable cause existed to search for the fruits of the defendant's illegal activity. *See U.S.* v. *Kornblau*, 586 F.Supp. 614, 624-25 (S.D.N.Y. 1984) (warrant listing "cash" as item to be seized sufficiently particular); *Hanger* v. *U.S.*, 398 F.2d 91, 98 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119, *reh'g denied*, 395 U.S. 971 (1969); *cf. U.S.* v. *Pryor*, 652 F.Supp. 1353, 1369 (D. Me. 1987).

We now turn to the defendant's additional contention that, while a more detailed description of fireworks, smokebombs and slot machines is arguably unreasonable, the warrant description of "records [and] ledgers" is unconstitutionally general in violation of the State Constitution. The defendant asserts that the trial court impermissibly added language to the warrant, by implication, in order to provide it with sufficient particularity. This argument fails. We will not read individual words of a warrant in isolation; the words "records [and] ledgers" must be read in their proper context. *See Emery*, 123 N.H. at 633, 465 A.2d at 924; *see also Andresen* v. *Maryland*, 427 U.S. 463, 480-81 (1975); *see also U.S. Storage Spaces Designated Nos. 8 & 49*, 777 F.2d 1363, 1370 (9th Cir. 1985), *cert. denied*, 107 S.Ct. 1291 (1987) (preceding listed in a search warrant implicitly limited otherwise overbroad description of contested item). Here, the warrant directed the search and seizure of "fireworks, smokebombs, records, ledgers, U.S. Currency, and slot machines," after stating that probable cause existed to believe that "fireworks, smokebombs, and slot machines [were]. . .being unlawfully sold/and or possessed." Reading the warrant in a common-sense fashion, we conclude that the description of records and ledgers was implicitly limited to those records and ledgers related to the sale or possession of fireworks, smokebombs and slot machines. *See Emery*, 123 N.H. at 633, 465 A.2d at 924, *see also Andresen*, *supra* at 479-82 (use of "other fruits" clause not impermissibly general when read in context of preceding language).

Just as the affidavit established probable cause to seize the entire inventory of fireworks, smokebombs and slot machines, it also established probable cause to search and seize records and ledgers relating to these items. *See U.S.* v. *Hershenow*, 680 F.2d 847, 851-52 (1st Cir. 1982) (warrant description of defendant's accident patient files sufficiently particular where underlying affidavit established probable cause to seize all files). Limited in this way, we hold that the description of records and ledgers, in addition to the description of fireworks, smokebombs, U.S. currency and slot machines, meets constitutional standards of particularity under part I, article 19 of our State Constitution.

Finally, as indicated by our reference to federal case law, the Federal Constitution provides the defendant with no greater protection, *see Andresen*, 427 U.S. at 479-82; *Cortellesso*, 601 F.2d at 31-32, and we need not consider the defendant's fourth amendment claim further.

Affirmed

All concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

IN CASE NO. 87-430 STATE OF N.H. *v.* PHILIP FITANIDES the court upon February 3, 1989 made the following order:

Defendant's motion for reconsideration is denied.

Distribution:
JOHN C. BOECKELER, ESQ.
ANDREW W. SERELL, ESQ.
Merrimack County Superior Court
Donna R. Craig, Supreme Court
File

RALPH H. WOOD, *Clerk*

APPENDIX C

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

86-S-421-I through 86-S-424-I
86-S-656-I through 86-S-658-I

THE STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

ORDER

The Court finds and rules that the warrant authorizing the search of the Hooksett Trading Post describes with sufficient particularity the items to be seized and does not violate the defendant's federal or state constitutional rights.

The warrant stated that "there is probable cause for believing that fireworks, smokebombs and slot machines are being unlawfully sold and/or possessed . . ." The warrant authorized the following property to be seized: "Fireworks, smokebombs, records, ledgers, U.S. currency and slot machines." When dealing with such contraband, it would be unreasonable to require any greater particularization. A fair reading of the entire warrant authorized seizure of fireworks, smokebombs and slot machines which are unlawfully sold or possessed, and records, ledgers and U.S. currency relative to the unlawful sale or possession of such fireworks, smokebombs or slot machines. *See Andresen* v. *Maryland*, 96 S. Ct. 2737, 2748-49 (1976); *State* v. *Emery*, 123 N.H. 630, 633 (1983).

The following disposition is made with respect to the defendant's Requests:

Numbers 1 through 4 are granted.
Number 5 is denied.
Number 6 is granted.
Numbers 7 through 9 are denied.
Numbers 10 through 12 are granted.

Number 13 is denied.

Number 14 is granted.

Number 15 is granted to the extent that there was filed in Hooksett District Court a Motion for Immediate Sealing of Records and For Other Relief shortly after the search.

Number 16 is denied, as this Court is not privy to the County Attorney's trial strategy.

Number 17 is denied. The letter is protected by the attorney-client privilege. (See Ruling on Number 11 above).

Number 18 is denied.

Based on the above Findings and Rulings, the Motion to Suppress is denied, except with respect to the letter protected by the attorney-client privilege referred to in Ruling Number 11 above.

/s/ MARGARET Q. FLYNN
MARGARET Q. FLYNN
Presiding Justice

DATED: February 13, 1987

APPENDIX D

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. MAY TERM, 1986

HOOKSETT DISTRICT COURT

IN RE DOCUMENTS SEIZED PURSUANT TO SEARCH WARRANT ISSUED BY THE CONCORD DISTRICT COURT ON MAY 29, 1986 AUTHORIZING A SEARCH OF PREMISES AT THE HOOKSETT TRADING POST, ROUTE 3, HOOKSETT, NEW HAMPSHIRE

MOTION FOR IMMEDIATE SEALING OF RECORDS AND FOR OTHER RELIEF

Now Comes Philip E. Fitanides by his attorneys, Roussos & Boeckeler, and says:

1. On May 28, 1986, Justice Michael F. Sullivan of the Concord District Court issed a search warrant authorizing law enforcement officers to conduct a search for "fireworks, smokebombs, records, ledgers, U.S. currency, and slot machines" at the Hooksett Trading Post, Route 3, Hooksett, New Hampshire.

2. After the search warrant was issued, officers of the New Hampshire State Police and the Hooksett police conducted a general search at the Hooksett Trading Post, and among other things, seized records, ledgers, and other documents.

3. The search warrant does not describe with particularity the records and ledgers that may be seized and, in that respect and possibly others, the warrant is overbroad, and it left unbridled discretion to the searching officers.

4. The search warrant was so broad that it, in effect, authorized a general rummaging through all files located at Hooksett Trading Post without any limitation on what kinds of records and ledgers could be seized by the police.

5. Because the warrant is overbroad and gave the executing officers no limitation or guidance, it is defective and violates the rights of Philip Fitanides against unreasonable

searches and seizures and to have a search conducted by a proper warrant describing the things to be seized, as guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and pt. I, art. 19 of the Constitution of New Hampshire. *Andresen* v. *Maryland*, 427 U.S. 463 (1976); *Re Application of Lafayette Academy, Inc.*, 610 F.2d 1, 5-6 (1st Cir. 1979); *U.S.* v. *Abrams*, 615 F.2d 541, 544 (1st Cir. 1980).

6. Furthermore, on information and belief, the records and documents seized included materials protected by the attorney/client privilege and documents required by the defendant and Astro Spectacular, Inc. in the conduct of a business. The records included an explosives license issued by the State of New Hampshire.

7. In order to conduct his business, Mr. Fitanides and Astro Spectacular, Inc. require the immediate return of the said records and licenses.

8. There is a likelihood that unless this Court issues an immediate order to have all records, ledgers, and other documents of every kind and description filed and impounded with the Court forthwith, that Mr. Fitanides' rights to privacy, rights in his attorney/client relationship, and Constitutional rights will be violated by the New Hampshire State Police and other law enforcement agencies who presently have the said records.

WHEREFORE, Mr. Fitanides requests an immediate order of the Court requiring the New Hampshire State Police and all other law enforcement agencies having possession of the said documents, to immediately seal the said records and deposit them with the Court forthwith and to order the New Hampshire State Police and other law enforcement agencies not to inspect or photocopy any of the said records pending further order of the Court. Mr. Fitanides requests the Court to permit his counsel to inspect, examine, and photocopy the contents of

all records, ledgers, and other documents seized during the search under such conditions as the Court may prescribe.

Respectfully submitted,

PHILIP E. FITANIDES
By His Attorneys:

ROUSSOS & BOECKELER
BY: /s/ JOHN C. BOECKELER
JOHN C. BOECKELER
1889 Elm Street
P.O. Box 992
Manchester, NH 03105
669-6686

DATED: May 29, 1986

I hereby certify that a copy of the foregoing Motion has this day been forwarded to Michael Th. Johnson, Esquire, County Attorney.

/s/ JOHN C. BOECKELER
JOHN C. BOECKELER

APPENDIX E

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SEPTEMBER TERM, 1986

SUPERIOR COURT

NO. 86-S-421-I THRU 86-S-424-I
NO. 86-S-656-I THRU 86-S-658-I

STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

AMENDED MOTION TO SUPPRESS

The defendant moves to quash a search warrant issued by the Concord District Court, County of Merrimack, State of New Hampshire, on May 28, 1986, authorizing law enforcement officers to conduct a search of "the Hooksett Trading Post, Route 3, Hooksett, New Hampshire and premises consisting of a brown barn/warehouse, all storage sheds and box trailer/vans upon the said premises and of the person of Philip Fitanides." The search warrant authorized a search for "fireworks, smoke bombs, records, ledgers, U.S. currency, and slot machines." And the defendant moves to suppress all derivative evidence of every kind gained by means of the search and to order all property seized during the search returned to the defendant. The grounds for this Motion are:

1. On May 28, 1986, New Hampshire State Police Trooper Terrence Kinneen applied to Justice Michael F. Sullivan of the Concord District Court for a search warrant to permit the search of the Hooksett Trading Post at Route 3, Hooksett, New Hampshire.

2. The search warrant application was supported by an affidavit signed by Trooper Kinneen.

3. On May 28, 1986, Concord District Court Justice Sullivan approved the warrant. The search pursuant to the warrant was conducted on the same day by the Merrimack County Attorney, the New Hampshire State Police, and the Hooksett Police.

4. The search warrant is defective and illegally issued in violation of the defendant's rights under the Fourth Amendment to the Constitution of the United States, and pt. 1, Art. 19 of the Constitution of New Hampshire, for the following reasons:

a. The search warrant does not describe with particularity the records and ledgers that may be seized. The search warrant authorized a general search through all records and ledgers at the Hooksett Trading Post without any limitation on the kinds of records and ledgers that could be seized during the search. Therefore, the warrant is overbroad and left unbridled discretion to the searching officers. Because the warrant is overbroad and gave the searching officers no limitation or guidance, it is defective and violates the rights of the defendant against unreasonable searches and seizures and to have a search conducted by a proper warrant particularly describing the things to be seized. *Andresen* v. *Maryland*, 427 U.S. 463 (1976); *Re Application of Lafayette Academy, Inc.*, 610 F.2d 1, 5-6 (1st Cir. 1979); *United States* v. *Abrams*, 615 F.2d 541, 544 (1st Cir. 1980).

b. The judge who issued the warrant and the state officials who executed it failed to minimize unnecessary intrusions on the defendant's personal property. As a result, the records and documents seized by the executing officials included documents protected by the attorney-client privilege and other personal documents. The defendant was present during the search and objected to the seizure and the inspection of the personal documents and documents protected by the attorney-client privilege. Nevertheless, the officers seized and read the said documents. When the officers examined the

privileged documents, it was immediately apparent to them that the documents were privileged. Notwithstanding the defendant's objections, the privileged nature of the documents, and the clear invalidity of the warrant as shown by paragraph 4a above, the State has used the documents for trial preparation.

c. The officer applying for the search warrant omitted certain information in the application that would have been material to the issuance of the warrant. The officer's failure to include the information amounted to reckless or deliberate material misrepresentation in the following respects: Paragraphs 4 and 5 of the search warrant affidavit refer to purchases of fireworks by Trooper Kinneen, Sergeant Gates, and Trooper Welch on various dates in May 1986. The information contained in those paragraphs of the affidavit imply that sales by Fitanides were at retail rather than wholesale. The officer who prepared the search warrant affidavit, however, failed to state in the affidavit evidence that the purchasers signed wholesale order forms at the time of purchase indicating to the seller that their purchases were in compliance with state and federal law. The officer's failure to include the evidence in the affidavit was misleading. As a result, there is a substantial basis for believing that the officer who applied for the search warrant intentionally or recklessly failed to state material facts in the search warrant application. Accordingly, this Court should conduct a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978) and *State* v. *Spero*, 17 N.H. 199 (1977).

5. The defendant had possession of the premises unlawfully searched by the Merrimack County Attorney, the New Hampshire State Police, and the Hooksett Police.

6. The defendant did not give the Merrimack County Attorney, the New Hampshire State Police, the Hooksett Police or any other law enforcement officers permission to enter and search his property.

7. The defendant had a reasonable expectation of privacy in his property and its contents and believed that his property would be free from intrusion.

8. The defendant objects to the use by the State of all evidence seized from his property, and all evidence derived from the search, which he understands is the product of an illegal search and seizure and obtained in violation of his rights to be free from unreasonable searches and seizures under the Constitutions of the United States and New Hampshire as alleged in this Motion.

WHEREFORE, the defendant prays the Honorable Court to:

A. Substitute this Amended Motion to Suppress for the original Motion to Suppress in cases 86-S-421-I thru 86-S-424-I and permit it to be heard at the hearings presently scheduled for December 16, 1986 at 10:00 a.m.;

B. Order all property of every kind seized from the Hooksett Trading Post on May 28, 1986, and all other evidence derived thereform, to be suppressed; order the search warrant quashed; and, order all property seized pursuant to the warrant returned to the defendant forthwith;

C. Make such further orders as justice may require.

Respectfully submitted,

PHILIP E. FITANIDES
By His Attorneys:

ROUSSOS & BOECKELER

BY: /s/ JOHN C. BOECKELER
JOHN C. BOECKELER
1889 Elm Street
P.O. Box 992
Manchester, NH 03105
669-6686

DATED: December 5, 1986

I hereby certify that a copy of the foregoing Amended Motion to Suppress has this day been forwarded to Michael Th. Johnson, Esquire, Merrimack County Attorney.

/s/ JOHN C. BOECKELER
JOHN C. BOECKELER

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SEPTEMBER TERM, 1986

SUPERIOR COURT

NO. 86-S-421-I THRU 86-S-424-I
NO. 86-S-656-I THRU 86-S-658-I

STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

AFFIDAVIT IN SUPPORT OF AMENDED MOTION TO SUPPRESS

I, Philip Fitanides, on oath depose and says as follows:

1. I am the defendant in the above captioned cases.

2. I am the owner of the Hooksett Trading Post, Route 3, Hooksett, New Hampshire, and I lived there and conducted a business there on May 28, 1986, and at all other times pertinent to this case.

3. I did not give the Merrimack County Attorney, the New Hampshire State Police, the Hooksett Police, or any other law enforcement officers permission to enter, search, and seize my property on May 28, 1986.

4. I had a reasonable expectation of privacy in my property and its contents and believed that my property would be free from unlawful intrusion.

5. I was present on the first floor of the building when the Merrimack County Attorney and the police searched my property on May 28, 1986. There were at least ten (10) police officers and the County Attorney present conducting the search. During the search, over my protest, they rummaged through my records and documents, some of which included my business records and confidential and privileged com-

munications from my attorneys. I believe that law enforcement officers have read these confidential and privileged documents even though they were fully aware that the said documents are privileged and confidential.

6. When sales of fireworks were made to law enforcement officers, wholesale order forms were completed by the officers stating that they would comply with the laws of the state of destination of the merchandise and that they would use or sell the merchandise in strict compliance with all applicable laws.

7. I object to the use by the State of all evidence seized from my property on May 28, 1986, and all evidence derived therefrom.

Philip Fitanides

DATED: December 8, 1986

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

Personally appeared this 8th day of December, 1986 the above named Philip Fitanides and made oath that the foregoing statements are true to the best of his knowledge and belief.

Justice of the Peace

APPENDIX F

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SEPTEMBER TERM, 1986

SUPERIOR COURT

NO. 86-S-421-I THRU 86-S-424-I
NO. 86-S-656-I THRU 86-S-658-I

STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW ON DEFENDANT'S AMENDED MOTION TO SUPPRESS

NOW COMES the defendant, Philip Fitanides, by his attorneys, Roussos & Boeckeler, and moves the Court to make the following findings of fact and rulings of law on the amended Motion to Suppress:

1. On May 28, 1986, New Hampshire State Police Trooper Terrence Kinneen applied for and received a search warrant from the Concord District Court authorizing a search of the Hooksett Trading Post, Route 3, Hooksett, New Hampshire.

2. The search warrant application was supported by an affidavit signed by Trooper Kineen.

3. The search warrant authorized a search for "fireworks, smoke bombs, records, ledgers, U.S. currency, and slot machines."

4. The possession of fireworks and smoke bombs is not illegal per se. RSA ch. 160.

5. The search warrant does not particularly describe the foreworks and smoke bombs that could be seized (i.e., instead of saying "fireworks and smoke bombs unlawfully exposed for

sale at retail in violation of RSA ch. 160," the warrant merely says "fireworks, smoke bombs.")

6. The possession of slot machines is not illegal per se. RSA 647:2, II, IV.

7. The search warrant does not particularly describe the slot machines that could be seized (i.e., instead of saying "slot machines used for gambling in violation of RSA 647:2," the search warrant merely says "slot machines.")

8. The search warrant does not particularly describe the records and ledgers that could be seized.

9. The search warrant is overbroad in its description of what is permitted to be seized and is, therefore, in violation of the rights of the defendant under the Fourth Amendment to the Constitution of the United States, and Pt. 1, Art. 19 of the Constitution of New Hampshire, to have a search conducted by a proper warrant particularly describing the things to be seized. *Marron* v. *United States*, 275 U.S. 192 (1927); *Stanford* v. *Texas*, 379 U.S. 476 (1965); *Andresen* v. *Maryland*, 427 U.S. 463 (1976); *Re application of Lafayette Academy, Inc.*, 610 F.2d 1, 5-6 (1st Cir. 1979); *United States* v. *Abrams*, 615 F.2d 541, 544 (1st Cir. 1980); *State* v. *Machine*, 97 N.H. 282 (1952); *State* v. *Emery*, 123 N.H. 630 (1983).

10. During the search of the Hooksett Trading Post, law enforcement officers seized records which contained a letter to the defendant from his lawyer.

11. The letter seized by law enforcement officers was protected by the attorney-client privilege.

12. The defendant was present during the search and objected to the search and seizure of the records which contained the attorney-client privileged letter.

13. It was immediately apparent to the law enforcement officers that the letter was a confidential communication to the defendant from his lawyer giving legal advise.

14. Law enforcement officers have read the attorney-client privileged letter, notwithstanding its privileged character.

15. The defendant's counsel attempted to minimize the State's intrusion on the defendant's attorney-client privilege by filing in the Hooksett District Court a Motion for Immediate Sealing of Records and for Other Relief shortly after the search.

16. The County Attorney's trial strategy contemplates possible use of the letter at trial.

17. It is improper for the State to make any use whatsoever of the privileged letter or any information derived therefrom.

18. It is improper for the State to make any use whatsoever of any evidence obtained during the May 28, 1986 search or any information derived therefrom.

Respectfully submitted,

PHILIP E. FITANIDES
By His Attorneys:

ROUSSOS & BOECKELER

BY: _____

JOHN C. BOECKELER
1889 Elm Street
P.O. Box 992
Manchester, NH 03105
669-6686

DATED:

I hereby certify that a copy of the foregoing Requests have this day been forwarded to Michael Th. Johnson, Esquire, Merrimack County Attorney.

_____

JOHN C. BOECKELER

APPENDIX G

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. JANUARY TERM, 1987

SUPERIOR COURT

No. 86-S-421-I THRU 86-S-424-I
No. 86-S-656-I THRU 86-S-658-I

STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

EXCEPTION

NOW COMES the defendant, Philip Fitanides, by and through his counsel, Roussos & Boeckeler, and respectfully objects and takes exception to the Court's Order of February 13, 1987, denying the defendant's Motion to Suppress. The grounds for the defendant's Objection and Exception are as follows:

1. The Court's denial of the defendant's Requests for Findings of Fact and Rulings of Law numbered 5, 7, 8, and 9 is clearly erroneous.

2. For the reasons stated in the defendant's Amended Motion to Suppress and Memorandum of Law in Support of Defendant's Motion to Suppress, the Court's order denying the Motion to Suppress is clearly erroneous; the failure of the search warrant to particularly describe the objects to be seized violated the defendant's rights under the Fourth Amendment to the Constitution of the United States and pt. I, art. 19 of the Constitution of New Hampshire.

Respectfully submitted,

PHILIP E. FITANIDES
By His Counsel:

ROUSSOS & BOECKELER
BY: /s/ JOHN C. BOECKELER
JOHN C. BOECKELER
1889 Elm Street
P.O. Box 992
Manchester, NH 03105
669-6686

DATED: February 20, 1987

CERTIFICATION

I hereby certify that a copy of the foregoing Exception has, on this date, been forwarded to Michael Th. Johnson, Merrimack County Attorney.

/s/ JOHN C. BOECKELER
JOHN C. BOECKELER

APPENDIX H

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. APRIL TERM, 1987

SUPERIOR COURT

NO. 86-S-422-I THRU
NO. 86-S-424-I

STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

MOTION TO SET ASIDE VERDICTS OF GUILTY

The defendant moves to set aside the verdicts of guilty returned on May 27, 1987 in the above captioned cases for the following reasons:

1. The Court erred in denying the defendant's Amended Motion to Suppress and in permitting, over the defendant's objection, the admission of the following evidence at trial: Exhibits 1, 2, 3, 4, 9, 10, 11, 12, 14A, 14B, 14C, 15A, 15B, 15C, 15D, 15E, 15F, 16A, 16B, 17A, 17B, 17C, 17D, 17E, 17F, 17G, 17H, 17I, 17J, 17K, 17L, 17O, 17P, 18, 19A, 19B, 19C, 19D, 20, 21, 22A, 22B, 22C, 23, 24, 25, 26, and 27; the testimony of Thomas Bowen, William Hagerty, Dana Ames, Jr., and David Schoenfeld; and the testimony of New Hampshire State Police Officers Terrence Kineen, Donald Gates, Allen Welch, Paul McLean, and Donald Palmer, to the extent the testimony of the State Police Officer witnesses was based on the illegal search and seizure alleged in the defendant's Amended Motion to Suppress and the admission of the evidence over the defendant's objection was erroneous because the failure of the search warrant to particularly describe the objects to be seized violated the defendant's rights under the Fourth Amendment to the Constitution of the United States

and pt. 1, Art. 19 of the Constitution of New Hampshire. In support of this, the defendant respectfully incorporates the arguments and authorities contained in his Amended Motion to Suppress Memorandums of Law in support of the defendant's Amended Motion to Suppress.

2. The Court erred in admitting Exhibit 27 into evidence over the defendant's objection, because the evidence was hearsay and the State did not produce the declarants named in the documents comprising Exhibit 27 for cross examination by the defendant. The State did not show that the declarants were not available as witnesses. The admission of the evidence violated the defendant's rights to confrontation under the Sixth and Fourteenth Amendments to the Constitution of the United States and pt. 1, Art. 15 of the Constitution of New Hampshire. *Ohio* v. *Roberts*, 448 U.S. 56 (1980); *State* v. *LeClair*, 121 N.H. 743 (1981). In addition, admission of the hearsay evidence violated Rule 802 of the New Hampshire Rules of Evidence.

3. The Court erred in denying the defendant's Motion for Directed Verdicts of Acquittal at the close of the State's evidence in cases 86-S-422-I, 423-I and 424-I (alleging sales of fireworks to Allen Welch, Terrence Kinneen, and Donald Gates) because the uncontradicted evidence established that the defendant was a resident wholesaler of fireworks who sold fireworks to Welch, Kinneen, and Gates; that Welch, Kinneen, and Gates were law enforcement officers at the times of their purchases; and that Welch, Kinneen, and Gates bought the fireworks for law enforcement purposes, and not for their own personal use and consumption. Therefore, the defendant's sales of fireworks to Welch, Kineen, and Gates were lawful under RSA 160:3.

4. The court erred in denying the defendant's Requests for Instructions 22 and 23, requesting that the jury be instructed:

22. In determining whether the sales in this case were wholesale or retail, you are instructed that it is the character of the selling, rather than the character of the buying, that is determinative.
23. In determining whether a sale is retail or wholesale, the sale must be examined from the point of view of the seller rather than the buyer.

It is likely that the Court's failure to give the requested instructions permitted the jury to become confused and to view the transactions as being either wholesale or retail based on the purchaser's, rather than the seller's, state of mind. The Court's failure to give requested Instructions 22 and 23 was confusing because the natural tendency of the failure, given the Court's broad instruction on the meaning of "wholesale," was to permit the jury to confuse the defendant's mental state with the purchasers' mental states, thereby permitting the jury to convict on an improper standard of proof. RSA 626:2, RSA 625:10.

WHEREFORE, the defendant respectfully requests this Court to:

A. Schedule a hearing on this Motion;
B. Set aside the verdicts of guilty;
C. Make such further orders as justice and equity may require.

Respectfully submitted,

PHILIP E. FITANIDES
By His Attorneys:

ROUSSOS & BOECKELER
BY: /s/ JOHN C. BOECKELER
JOHN C. BOECKELER
1889 Elm Street
P.O. Box 992
Manchester, NH 03105
669-6686

DATED: May 28, 1987

I hereby certify that a copy of the foregoing Motion has this day been forwarded to Howard A. Helrich, Esquire, Assistant County Attorney.

/s/ JOHN C. BOECKELER
JOHN C. BOECKELER

APPENDIX I

THE STATE OF NEW HAMPSHIRE

SUPREME COURT
1989 TERM
JANUARY TERM

No. 87-430

STATE OF NEW HAMPSHIRE

v.

PHILIP FITANIDES

MOTION FOR RECONSIDERATION

The defendant respectfully requests the Court to reconsider its December 28, 1988, decision affirming the order of the Superior Court denying the defendant's amended motion to suppress evidence and affirming the defendant's convictions. In the professional judgment of defendant's counsel, the Court has overlooked or misapprehended the following particular points of law and fact:

1. The requirements of the Fourth Amendment to the Constitution of the United States have been applied to the states through the due process clause of the Fourth Amendment to the Constitution of the United States. *Wolf* v. *Colorado*, 338 U.S. 25 (1949). The exclusionary rule of the Fourth Amendment applies to the states. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

2. The defendant has raised his rights under the Fourth and Fourteenth Amendments to be free from searches and seizures without a warrant particularly describing the things to be seized.

3. The search warrant affidavit in this case did not establish probable cause to seize every record and ledger on the premises to be searched.

4. The search warrant affidavit was not attached to and incorporated into the search warrant.

5. This Court's decision holds that the search warrant's description of "fireworks, smokebombs, ledgers, U.S. Currency, and slot machines," read in a common-sense fashion implicitly limited the records and ledgers which could be seized to records and ledgers related to the sale or possession of fireworks, smokebombs, and slot machines. The decision overlooks the fact that in every cited case relied upon by this Court interpreting the Fourth Amendment, there was an explicit limitation in the search warrant on the types of records that could be seized.

6. This Court's holding that when read "in a common-sense fashion" the warrant implicitly limited the records and ledgers to be seized to records relating to the sale or possession of fireworks, smokebombs, and slot machines overlooks that it is affidavits for search warrants, rather than search warrants, that may be read in a common-sense fashion, and that police officers must read the warrants they are commanded to execute according to their plain language.

ARGUMENT

In ruling that the description of "records [and] ledgers" to be seized is particular enough to satisfy the Fourth Amendment to the Constitution of the United States, this Court apparently relied on the cases of *State* v. *Emery*, 123 N.H. 630, 633 (1983); *Andresen* v. *Maryland*, 427 U.S. 463, 480-81 (1975); *United States* v. *Storage Spaces Designated Nos. 8 & 49*, 777 F.2d 1363, 1370 (9th Cir. 1985); and *United States* v. *Hershenow*, 680 F.2d 847, 851-52 (1st Cir. 1982). The *Emery* case has nothing to do with the sufficiency of a search warant authorizing a search for records. The search warrant description for the records to be seized in *Andresen* v. *Maryland* case was as follows:

> *. . . the following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:*

> title notes, title abstracts, title rundowns; contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others; lien payoff correspondence and lien pay-off memoranda to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lenders instructions for a construction loan or construction and permanent loan; disbursements sheets and disbursement memoranda; checks, check stubs and ledger sheets indicating disbursement upon settlement; correspondence and memoranda concerning disbursements upon settlement; settlement statements and settlement memoranda; fully or partially prepared deed of trust releases, whether or not executed and whether or not recorded; books, records, documents, papers, memoranda, and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, or the Annotated Code of Maryland, 1957 Edition, as amended and revised, together with other fruits, instrumentalities and evidence of crime at this time unknown. *Andresen* v. *State*, 24 Md. App. 128, 331 A.2d 78 (1975) (emphasis added).

In *United States* v. *Storage Spaces Designated Nos. 8 & 49*, the search warrant, according to the reported case, permitted a search for items which included,

> all other drugs, labels for drugs, orders and checks for drugs, *records and correspondence relating to purchases, sales, packing and distribution of drugs*; and other fruits and instrumentalities of crimes which are evidence of violation of, or in violation of, 21 U.S.C. §331(a) and (k). 777 F.2d 1363, 1368 (emphasis added).

In the *Hershenow* case, the search warrant description, according to the court,

> authorized a search and seizure of *appointment books for the period January 1, 1976 to December 31, 1979; all accident patient files together with related manila folders containing accident patient history forms, charge cards, bills and correspondence related to accident patient files, active and inactive, for the years 1976-1979;* and a rubber 'Office Exam' hand stamp; which constitute evidence of violations of Title 18, United States Code Section 1341. 680 F.2d 847, 850 (emphasis added).

In each of these cases there was an explicit description of the records to be seized. In no case was there a description which even comes close to the description "fireworks, smokebombs, records, ledgers, U.S. currency, and slot machines." Counsel for the defendant has not been able to find any reported case which has gone as far as this Court in interpreting the particularity requirement of the Fourth Amendment in a document search.

A search warrant must be interpreted by the officers who conduct the search according to the plain meaning of its words. *Marron* v. *United States*, 275 U.S. 192 (1927). Such an interpretation of the warrant in this case would require the officers to seize the records and ledgers which the magistrate ordered them to seize: "records, ledgers," without any limitation. That is what the warrant says, and that is what the officers were supposed to do. The words are not ambiguous. Each word in the precept section of the warrant states a different and distinct class of objects to be seized. The objects are grammatically identical and of equal importance. The statement in this Court's decision that a common-sense reading of the warrant implicitly limited the records and ledgers to be seized is simply not supported by logic, rules of interpretation, rules of grammar, or case authorities interpreting the Fourth

Amendment. It is warrant affidavits, and not warrants themselves, which may be read in a "common-sense" fashion. *United States* v. *Ventresca*, 380 U.S. 102, 109 (1965); *United States* v. *Abrams*, 615 F.2d 541, 543-44 (1st Cir. 1980). This is not to say, of course, that search warrants should be read in a nonsensical fashion. But it recognizes that a search warrant is a court order to an officer to seize certain particularly described items. RSA 595-A:2; See *Hussey* v. *Davis*, 58 N.H. 317 (1878). The officer who executes the warrant is not permitted to read limitations into it by implication and "common-sense." Magistrates may read affidavits in support of search warrant applications in a common-sense fashion when they decide if there is probable cause to issue a warrant. Officers must then follow the Magistrate's command in conducting the search.

Magistrates and police officers perform different functions. Police officers apply for and execute search warrants. They perform an executive function. Magistrates decide whether there is probable cause to issue warrants and, if there is, the particular things to be seized. Magistrates perform a judicial function. In performing their judicial function they make common-sense judgments. Their judgments are usually matters of opinion, that is, whether a common-sense reading of the warrant establishes probable cause. The magistrate's finding of probable cause is entitled to some deference. *Illinois* v. *Gates*, 462 U.S. 213 (1983). These principles of judicial interpretation, probable cause finding, and discretion do not apply to officers executing search warrants.

The defendant's counsel believes that this Court has misapprehended the case authorities interpreting the Fourth Amendment's particularity requirement in document searches. If the Court's decision stands in this case, it is likely to create more problems than it will solve. The addition of language to unambiguous search warrants by common-sense implication for the purpose of curing lack of particularity will create confusion. There could not be a better example than the

search warrant in this case. Adding language to it by implication results in the following possible interpretations of the records and ledgers to be seized, each arguably based on "common-sense": (1) record and ledgers evidencing possession or sale of smokebombs and fireworks, but not slot machines; (2) records and ledgers evidencing possession or sale of smokebombs, fireworks, and slot machines; or (3) all records and ledgers. The first interpretation would make sense if the police officers thought the records and ledgers to be seized were impliedly limited by the type of objects preceding the words "records, ledgers," i.e. fireworks and smokebombs. The second interpretation would make sense if the police officers thought the only limitation on the record and ledgers to be seized was the probable cause to which the warrant related. The third interpretation would make sense if the police officers gave the words in the command section of the warrant their plain meaning, if they thought the description of the things to be seized was unambiguous, if they had a good sense of grammatical construction, and if they had any training in the Fourth Amendment's requirements of particularity. The third interpretation, although it is the only reasonable interpretation of the warrant in this case, would obviously be too broad because the search warrant affidavit did not establish probable cause to seize every record and ledger on the premises.

These examples illustrate the danger of adding language to search warrants by implication. There is no getting around the fact that the Superior Court judge, in effect, rewrote a clear and unambiguous warrant by adding language consistent with interpretation (2) above. But the officers who executed the warrant did not have the benefit of the Superior Court's interpretation when they conducted the search, and there is no reason why the limitation put on the warrant by the Superior Court with respect to records and ledgers ("relative to the unlawful sale or possession of such fireworks, smokebombs or

slot machines") could not have been written into the warrant in the first place. The Court's statement that "We will not read individual words of a warrant in isolation: The words 'records [and] ledgers' must be read in their proper context" goes too far and is not based on cases interpreting the Fourth Amendment. Counsel is not aware of any reported case holding that the precept section of a warrant is impliedly limited by a separate recitation in the warrant that the Magistrate has found probable cause to believe that a certain crime has been committed or that certain evidence may be found.

As a result of this Court's decision, it is altogether possible that law enforcement agencies seeking search warrants in New Hampshire will add the boiler-plate phrase "records, ledgers," now approved by this Court, to every search warrant, without describing the particular records and ledgers to be seized, and then rummage through and seize every record and ledger on the premises to be searched with the knowledge that when an objection is made, the reviewing court will by common-sense implication interpret the warrant to mean that the search was limited to records and ledgers having to do with the probable cause for the issuance of the warrant. A possible and dangerous extension of the Court's holding is that police officers executing search warrants will base their common-sense interpretations of search warrants by implication on other approaches — such as the "totality-of-the-circumstances" — which are used by magistrates in deciding whether to issue search warrants. Another result of the Court's decision, which counsel believes is not intended, is that a state statute requiring bank financial records to be described with particularity in search warrants now gives New Hampshire citizens more protection than the Fourth Amendment, even though language in the statute ("described with particularity") is similar to language of the Fourth Amendment ("particularly describing"). See *State* v. *Sheedy*, 124 N.H. 738, 741-42 (1984) (interpreting RSA 359-C:4 I). Coun-

sel for the defendant believes that the Court has overlooked and misapprehended cases interpreting the particularity requirement of the Fourth Amendment, that the Court has blurred the important distinction between the magistrate's judicial function and the police officer's executive function, and that the Court has not considered the full implications of its decision in this case.

For the reasons set forth above, the defendant asks this Court to reconsider its decision affirming the defendant's convictions, to reverse the defendant's conviction on the ground that the Court below erred by denying the defendant's Amended Motion to Suppress, and to remand the cases for a new trial.

Respectfully submitted,

PHILIP E. FITANIDES
By His Attorneys:

ROUSSOS & BOECKELER

BY: /s/ JOHN C. BOECKELER
JOHN C. BOECKELER
1889 Elm Street
P.O. Box 992
Manchester, NH 03105
669-6686

DATED: January 4, 1989

I hereby certify that a copy of the foregoing Motion for Rehearing or Reconsideration has this day been forwarded by first class mail, postage prepaid, to Stephen E. Merrill, Attorney General; Andrew W. Serell, Assistant Attorney General; Howard A. Helrich, Assistant Merrimack County Attorney; and Marshall A. Buttrick, Clerk of the Merrimack Superior Court.

/s/ JOHN C. BOECKELER
JOHN C. BOECKELER

APPENDIX J

WARRANT

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS CONCORD DISTRICT COURT

To the Sheriffs of our several counties, or their deputies, any State Police Officer, or any Constable or Police Officer of any city or town, within our State.

Proof by affidavit (supplemented by oral statements under oath) having been made this day before

MICHAEL F. SULLIVAN
(name of person authorized to issue warrant)

by TERRENCE P. KINNEEN
(names of person or persons whose affidavits have been taken)

that there is probable cause for believing that fireworks, smokebombs, and slot machines are being unlawfully sold/and or possessed
(certain property which has been stolen, embezzled, or fraudulently obtained; OR is intended for use or has been used as the means for committing a crime; OR is contraband; OR is evidence of the crime to which the probable cause upon which this search warrant relates.)

may be found in the possession of Philip Fitanides
(identify)

at premises located at The Hooksett Trading Post, Rte. 3, Hooksett N.H. (specify)

We therefore command you in the daytime to make an immediate search of The Hooksett Trading Post, Rte. 3, Hooksett N.H. and premises consisting of a brown barn/warehouse, all storage sheds and box trailer/vans upon the said premises
(identify premises) (occupied by AB)

and of the person of PHILIP FITANIDES
(A.B. and any other identifiable individuals with respect to whom probable cause has been established by the affidavit or supplementary testimony.)

for the following property: (describe property) fireworks, smokebombs, records, ledgers, U.S. Currency, and slot machines and if you find any such property or any part thereof to bring it and the person in whose possession it is found before Hooksett District Court at _____
(court having jurisdiction) (location)

Dated at Concord this 28 day of May 1986
(city or town)

/s/ MICHAEL F. SULLIVAN
Justice of the Concord District Court

(Court seal)

APPENDIX K

APPLICATION FOR SEARCH WARRANT AND SUPPORTING AFFIDAVIT

(THIS APPLICATION AND AFFIDAVIT TO BE DETACHED BY JUSTICE ISSUING WARRANT AND FILED SEPARATELY WITH THE COURT TO WHICH THE WARRANT IS RETURNABLE.)

Instructions: A person seeking a search warrant shall appear personally before any justice, associate justice or special justice of the municipal, district or superior court and shall give an affidavit in substantially the form hereinafter prescribed. The affidavit shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and the affidavit may be supplemented by oral statements under oath for the establishment of probable cause. The person issuing the warrant shall retain the affidavit and shall make notes personally of the substance of any oral statements under oath supplementing the affidavit or arrange for a transcript to be made of such oral statements. The person issuing the search warrant shall deliver the affidavit and the notes or transcript within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court of record.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. (county) — CONCORD DISTRICT COURT

May 28, 1986

I, Terrence P. Kinneen being duly sworn, depose and say:
(Name of applicant)

1. I am trooper with the New Hampshire State Police
(describe position, assignment, office, etc.)

2. I have information, based upon see attached affidavit
(describe source, facts indicating reliability and credibility of source and nature of information; if based on personal knowledge, so state)

3. Based upon the foregoing information (and upon my
(strike out if not applicable)
personal knowledge) there is probable cause to believe that the property hereinafter described is being unlawfully
(has been stolen, etc.)
sold/and or possessed and may be found Philip Fitanides
(in the possession of A.B. or any other person)
at premises The Hooksett Trading Post, Rte. 3 Hooksett N.H.
(identify)

4. The property for which I seek the issuance of a search warrant is the following fireworks, smokebombs, ledgers, records, U.S. currency, and slot machines
(here described the property as particularly as possible)

FORM: DSSP 27A

STATE OF NEW HAMPSHIRE
MERRIMACK, SS.

AFFIDAVIT

I, Terrence P. Kinneen being duly sworn do hereby depose and say

1. I am a Trooper with the New Hampshire State Police, assigned to the Special Investigation Unit and have been a State Police Officer for over three and a half years. The primary responsibility of the Special Investigation Unit is the undercover investigation of crimes. These crimes include the illicit sale of regulated items.
2. I have conducted an investigation into the illicit merchandising of fireworks and gambling machines at the Hooksett Trading Post, Route 3, Hooksett, New Hampshire by one Philip Fitanides and employees.
3. On May 23, 1986, upon approaching the Hooksett Trading Post by way of Route 3 (a public highway) this writer saw in plain view the large signs (approximately 3'x7') at the entrance to this commercial establishment which is open to the public as a retain second hand store. The signs stated "Fireworks," without restriction as to the wholesale or retail. Photographs of these signs taken May 28, 1986 are appended to this affidavit and incorporated hereby.
4. On May 23, 1986 this affiant purchased $90.00 dollars worth of fireworks and smokebombs at the Hooksett Trading Post from one Philip Fitanides who runs the Hooksett Trading Post. This writer filled out a form that stated I live in Salem, New Hampshire. The affiant told Philip that I was going home to light off the fireworks. Philip didn't cancel the order or make a comment. The affiant asked Philip if I would be able to buy more without making such a large purchase. He answered yes because you're a good customer. On May 23, 1986, Sgt.

Donald Gates bought $84.00 dollars worth of fireworks at the Hooksett Trading Post off Philip Fitanides. Sgt. Gates told Philip that he was going to Daniel's Lake in Weare and fire the fireworks off on Memorial Day. Philip didn't make a comment or cancel the order. Philip Fitanides didn't ask this writer or Sgt. Gates for any identification. At this time a large inventory of fireworks were visible throughout the left portion of the merchandise floor, in an area seperated by plywood from the main store area.

5. On May 27, 1986 this writer and Trooper Welch went to the Hooksett Trading Post to purchase more fireworks. This affiant told Philip that I fired off the M70 that he had given me and it was a dud. This affiant stated "I threw it into the water and it didn't make the noise I expected." Philip stated that he can't be held responsible for the product. This writer ordered half a gross of M70 firecrackers. Philip gave them to this writer and stated that they might not be what I expected. Philip stated "try these" and handed this writer a package of thundersticks. Philip stated to this writer, "do me a favor don't use these at night and don't use them where the cops will get you." This writer purchased the M70 and the thundersticks. This writer stated "I wasn't afraid of the Salem cops" and "they couldn't catch me." This writer purchased both items (M70 and thundersticks). On May 27, 1986 Trooper Welch returned to the Hooksett Trading Post and met Philip Fitanides. Fitanides placed all proceeds for sales witnessed by this writer into his wallet which he placed in his pocket. All sales are strictly cash. Welch bought $30.00 dollars more worth of fireworks (thundersticks). Welch stated he blew off a few of these thundersticks and he wanted to buy more. Philip asked Welch to produce some identification. Welch produced an ID with a Peterborough address. Welch was asked to fill out a form because he was buying thundersticks.

Welch told Philip he was going to blow off a few and sell the rest to little kids. Philip let the sale go through. Welch also saw a substantial inventory of fireworks at this time.

6. On May 23, 1986 this affiant played slot machines in the second hand merchandise area of the Hooksett Trading Post. This writer received two fifty cent payoffs (5 dimes) while playing approximately $2.50 in change. This writer asked the older woman watching the store for change to play the slot machines and the older woman gave this writer 50¢ worth of dimes (5 dimes). This writer asked this woman (known as Philip Fitanides' mother) if there was a payoff if you win with these machines and Mrs. Fitanides answered "yes."
7. On May 23, 1986 Sgt. Gates played these slot machines without winning. This affiant and Sgt. Gates witnessed other people in the store playing these machines. On May 27, 1986 this writer played approximately $2.00 worth of dimes and all winnings in a slot machine in the Hooksett Trading Post. This writer had seven payoffs of 30¢ (3 dimes) during the time I played. During this time, the affiant had a conversation with Mrs. Fitanides. This woman stated she was Philip's mother. The woman inquired, How much did you loose?" This affiant answered at this point "$1.00." The older woman stated "they would have thrown you out of Vegas." While playing the second dollars worth of dimes on May 27, 1986 this writer was seen playing by the older woman as well as Philip. Neither the older woman or Philip told this affiant to get away or leave the machines alone.
8. On May 27, 1986 when approaching the Hooksett Trading Post on Route 3 in Hooksett, New Hampshire there was an A,B F Freight truck backed up to the front left door of the building. Mrs. Fitanides stated to this writer "You will have to wait, they're unloading a trailer

of fireworks now." "We won't be able to sell any until the truck is unloaded." During all visits to this location there were observed numerous customers purchasing fireworks continuously.

9. On May 27, 1986, this writer saw four (4) slot machines in the public area of Hooksett Trading Post. One machine had a sign on it stating "Out of Order." Two machines had signs on them "Do Not Play." This writer played the fourth machine. Trooper Welch asked Mrs. Fitanides why the two machines had "Do Not Play" on them. Mrs. Fitanides answered "they are out of order, do you know how to fix them?"

Based on the information contained in the affidavit, the affiant believes that the aforementioned Philip Fitanides and the Hooksett Trading Post are in violation of R.S.A. 160:2 and 647:2, in that they are engaged in the ongoing business of selling fireworks at retail, offering to sell fireworks at retail, exposing fireworks for sale at retail and merchandising gambling devices for use to discharge money. Therefore, I request that the Concord District Court issue a Search Warrant for the Hooksett Trading Post, Route 3, Hooksett, New Hampshire, and premises consisting of a brown barn/warehouse, all storage sheds and box trailers/vans upon the said premises, and the person of Philip Fitanides, and an Arrest Warrant for Philip Fitanides for Sale of Fireworks, in violation of R.S.A. 160:2.

Then personally appeared the above-named Terrence P. Kinneen and made oath that the foregoing affidavit by him subscribed is true.

/s/ Terrence P. Kinneen

Before me this 28th day of May, 1986.

/s/ M.F. Sullivan

APPENDIX A
(TPK 5/28/86)



APPENDIX B
(TPK 5/28/86)



APPENDIX C
(TBK 5/28/86)



RETURN

I received the attached search warrant on May 28, 1986 and have executed it as follows:

On May 28, 1986 at 3:25 o'clock P.M., I searched Philip Fitanides & The Hooksett Trading Post described in the warrant and I left a copy of the warrant with Philip Fitanides

(Names of persons searched and occupant if not a person searched: describe the premises searched if occupant not present.)

at Hooksett Trading Post, Rte. 3, Hooksett, N.H., together with a receipt for the items seized.

(the premises searched)

The following is an inventory of property taken pursuant to the warrant.

(attached receipt of item taken)

This inventory was made in the presence of *Terrence P. Kinneen* and *Donald Palmer, Paul McLean, Warren Brown.*

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ TERRENCE P. KINNEEN

Subscribed and sworn to before me this day of 19.

Justice of the Peace

APPENDIX L

NEW HAMPSHIRE REVISED STATUTES ANNOTATED

CHAPTER 160

160:1 Definition. The word "fireworks" as used in this chapter shall mean and include any combustible or explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible or an audible effect by combustion, explosion, deflagration or detonation, and shall include blank cartridges, toy cannons in which explosives are used, the type of balloons which require fire underneath to propel the same, firecrackers, torpedoes, skyrockets, Roman candles, bombs, sparklers or other fireworks of like construction and any fireworks containing any explosive or flammable compound, or any tablets or other device containing any explosive substance. Provided, however, that said word "fireworks" shall not include toy pistols, toy canes, toy guns or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, provided they are so constructed that the hand cannot come in contact with the cap when in place for the explosion, and toy pistol paper caps which contain less than twenty hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times.

160:2 Permits for Pyrotechnic Displays. Except as hereinafter provided it is unlawful for any person, firm, copartnership, or corporation to offer for sale, expose for sale, sell at retail, or use or explode any fireworks: provided that the licensing board of any city or town, or if a duly constituted licensing board does not exist, the chief police officer of a city or town, if any, otherwise the selectmen of the town or the commissioners of a village district, is hereby authorized to grant permits for supervised public displays of fireworks by municipalities, fair associations, amusements parks, and other organizations or groups of individuals. Every such display

shall be handled by a competent operator to be approved by the chief officers of the police and fire departments, the board of selectmen, or the commissioners, of the city, town or village district in which the display is to be held and shall be of such a character, and so located, discharged or fired as in the opinion of the chief of the fire department or fireward, after proper inspection, shall not be hazardous to property or endanger any person or persons. Application for permits shall be made in writing at least 15 days in advance of the date of the display. After such privilege shall have been granted, sales, possessions, use and distribution of fireworks for such display shall be lawful for the purposes of the permit only. No permit granted hereunder shall be transferrable.

160:3 Exceptions. Nothing in this chapter shall be construed to prohibit any resident wholesaler, dealer, or jobber to sell at wholesale such fireworks, as are not herein prohibited; or the sale of any kind of fireworks, provided the same are to be shipped directly out of state; or the use of fireworks by railroads or other transportation agencies for signal purposes of illumination, or law enforcement agencies or the sale or use of blank cartridges for a show or theatre, or for signal or ceremonial purposes or in athletics or sports, or for use by military organizations.

160:4 Enforcement. The law enforcing authorities of the state, counties, or any city or town, are authorized and directed to seize, take, remove, or cause to be removed at the expense of the owner all stocks of fireworks or combustibles offered or exposed for sale, stored or held in violation hereof.

160:5 Penalties. Any person, firm, copartnership or corporation violating any of the provisions of RSA 160 shall be guilty of a misdemeanor, and in addition shall be liable, in any civil action, to any person for damages resulting from such illegal sale or use of fireworks, and neither assumption of risk nor such contributory negligence shall be a defense for such violator.

160:6 Giant Crackers, etc. If any person shall have in his possession any firecrackers of a greater length than 6 inches and of a greater diameter than one inch, or explosives known as cane or potash dextrine tablets, with intent to sell the same, or shall sell, or offer to sell or to give away the same, he shall be guilty of a violation.

CHAPTER 595

595-A:2 Requisites of Warrant. Search warrants shall designate or describe the person, building, vessel, or vehicle to be searched and shall particularly describe the property or articles to be searched for. They shall be substantially in the form prescribed in RSA 595-A:3 and shall be directed to a sheriff or his deputy or to a constable or police officer, commanding him to search in the daytime, or if the warrant so directs, in the nighttime, the person, building, vessel, or vehicle where the property or articles for which he is required to search are believed to be concealed, and to bring such property or articles when found, and the persons in whose possession they are found, before any district or municipal court named therein.

CHAPTER 647

647:2 Gambling. A person is guilty of a misdemeanor if he knowingly and unlawfully:

I. Permits gambling in any place under his control; or

II. Gambles, or loans money or any thing of value for the purpose of aiding another to gamble; or

III. Has in his possession a gambling machine.

IV. For purposes of this section "unlawfully" means not specifically authorized by law or not solely for amusement, without stake or possibility of gain or loss. "Gambling machine" means any device or equipment which is capable of being used to discharge money or

anything that may be exchanged for money, or to display any symbol entitling a person to receive money. "Antique gambling machine" means any device or equipment at least 25 years old which is in the possession of a collector and which is not maintained or operated for gambling purposes. "Gambling" means to risk something of value upon a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

V. All implements, equipment, and apparatus used in violation of this section shall be forfeited.

VI. An antique gambling machine in the possession of a collector and which is not maintained or operated for gambling purposes shall not be subject to the provisions of this section. For the purpose of this section a "collector" is defined as a person who for nostalgic reasons, monetary investment or personal interest acquires antique gambling devices as defined in RSA 647:2, IV, for personal display or retention.

Under these circumstances, the state courts properly found that the warrant described the items to be seized with sufficient particularity.

Because this case is squarely on point with *Andresen v. Maryland, supra*, and because it does not present any new issue of law with wide-ranging implications, a writ of certiorari should not issue.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
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Attorney General

Brian T. Tucker
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State House Annex
Concord, NH 03301
603-271-3658
Counsel of Record